

BUSINESS LAW TODAY

Keeping Current:

The New York State Supreme Court Commercial Division: Past, Present, and Future

By Hon. Timothy S. Driscoll

In 1995, under the leadership of then-Chief Judge Judith Kaye, New York State established the Commercial Division of the Supreme Court. Upon its creation, the Commercial Division was one of the first state court trial divisions devoted entirely to business cases.

Fast forward almost 20 years later. The success of the Commercial Division can be measured by the depth and breadth of the cases over which its judges preside, the active and innovative management techniques employed by individual judges to manage cases of ever-increasing complexity, and the desire of nearly all counsel who are litigating a business case to have their matter heard in the Commercial Division. The four judges from New York County (Manhattan) who originally comprised the Commercial Division have grown to over 25 judges throughout New York City, its suburbs, and the remainder of the state. The Commercial Division has its own procedural rules, found at 22 NYCRR § 202.70, which are designed to ensure the expeditious resolution of cases assigned to the division.

Responding to calls from the business community and the bar to ensure that the Commercial Division reflected the stature of New York State as a commercial center of the nation and indeed the world, Chief Judge Jonathan Lippman convened a Task Force co-chaired by now-former Chief Judge Kaye and commercial practitioner Martin Lipton of Wachtell, Lipton, Rosen & Katz to recommend ways in which the

Commercial Division could retain its quality, reliability, and visibility. That Task Force, which included judges and attorneys from private practice, government, corporations, and academia, issued a report in June 2012. The report recognized that the Commercial Division "provides a benefit to the economy and society of New York and an incentive to businesses to locate in New York." Nevertheless, the Task Force recommended various areas of focus to "ensur[e] that the Commercial Division continues to earn that approbation." Those recommendations were divided into six categories: (1) revising the docket of the Commercial Division, (2) providing additional support for the Commercial Division judges, (3) reforming the procedures by which cases are assigned to and managed by the Commercial Division, (4) facilitating early resolution of Commercial Division cases, (5) supporting international arbitration of commercial cases, and (6) addressing long-term strategic goals for the Commercial Division.

Acting upon the suggestion in the last category, in March 2013 Chief Judge Lippman appointed a statewide Advisory Council on the Commercial Division. The Advisory Council, chaired by Robert Haig of Kelley Drye & Warren, consists of over 40 judges and attorneys from throughout the state. The Council has already formulated proposals to implement a significant number of the Task Force's recommendations, which have in turn been adopted by Chief Administrative Judge A. Gail Pru-

denti upon the advice and consent of the Administrative Board of the New York State Courts. Among the highlights of the Advisory Council's proposals that have been adopted thus far are:

1. Increased Monetary Thresholds for Commercial Division Cases

The monetary threshold for assignment of a case to the Commercial Division had ranged from \$25,000 to \$150,000, depending on the geographic area of the state. Initially focusing on New York County, which has a plurality of the Division's judges and cases, the Task Force recommended, and the Administrative Board adopted, a threshold of \$500,000 for new cases filed there, and a doubling of the threshold in nearly every other geographic area.

2. More Robust and Timely Expert Disclosure

New York State's Civil Practice Law & Rules (CPLR) differs markedly from the federal rules regarding expert disclosure. The federal rules, of course, require full disclosure of the expert's opinions, including the opportunity to depose the expert. Not so the CPLR. It requires only the disclosure in "reasonable detail" of the subject matter of the expert's testimony and the expert's opinions, as well as the qualifications of the expert, and does not expressly permit a deposition. Moreover, the CPLR does not contain any specific time requirement by which an expert must be disclosed.

The Task Force expressed concern that this led to a lack of predictability and efficiency in Commercial Division cases, and thus the Commercial Division rules were amended to require expert disclosure that largely mirrors the practice in federal court.

Under the new rule, the parties are to confer on a schedule for expert disclosure no later than thirty days prior to the completion of fact discovery, and shall complete expert disclosure no later than four months after the completion of fact discovery. Expert disclosure is to be accompanied by a written report, and the expert is subject to a deposition. Finally, expert disclosure that is not timely provided can result in preclusion of that expert from testifying at trial.

3. Limitations on Privilege Logs

Privilege logs are often described as the bane of any commercial litigator's existence, surpassing only slightly the desire of judges to review those logs. Privilege logs often spawn satellite litigation that is costly and delays resolution of the case. The ubiquity of electronic discovery has increased these difficulties almost logarithmically. The Advisory Council thus recommended, in recognition of the successful protocol in place in the Delaware Court of Chancery, that the parties meet and confer throughout the case to discuss the scope of privilege review, and use categorized designations for privileged documents rather than individual listings in a privilege log. The parties are further required to designate an attorney to supervise the privilege review process. In the event that a party requesting documents refuses to permit a categorical approach, and instead insists on a document-by-document listing, the producing party may apply to the court

for allocation of costs incurred in producing such a document-by-document log.

4. Limitations on Interrogatories

Mirroring the local rule in the United States District Court for the Southern District of New York, the Commercial Division rules now limit to 25 the number of interrogatories that a party may serve, and restricts their scope to (1) names of witnesses who have information "material and necessary" to the subject matter in the action, (2) the computed amount of alleged damages, and (3) the location and description of any "material and necessary" documents and other physical evidence. Parties may consent to the waiver of these limitations, or the court may permit deviation from the limitations upon a showing of good cause.

5. Establishment of a Pilot Program for Mandatory Mediation

As anyone who has participated in a complex commercial dispute knows, business cases are extremely expensive to litigate. Both the Task Force and the Advisory Council quickly learned that the business community clamored for mandatory mediation at the outset of a case. Judges, however, had individual practices and predilections that might not be as hospitable to mediation. A pilot program for New York County was thus established in which one of every five new cases in that county is designated for mandatory mediation upon assignment to a judge. The parties can either jointly select a mediator or request appointment of a mediator by the court. The parties are then to advise the court as to the success of the mediation within seven months of the date on which the case was initially assigned to

the judge. The program does have flexibility, as the parties can either stipulate that they wish to opt out of mediation or can request that, upon a showing of good cause, the assigned judge exempt the matter from the program. This program was launched as a pilot on July 28, and will be in place for 18 months.

6. The Opportunity for Accelerated Adjudication of Commercial Disputes

Imagine a commercial case being ready for trial in nine months! That is the reality, upon the parties' consent – including such consent in a contract signed in the course of the parties' business dealings. The Commercial Division's new accelerated adjudication procedure will render a case trial ready in nine months. This procedure requires the parties to (1) agree to waive any defenses based on lack of personal jurisdiction or *forum non conveniens*, and also waive their rights to trial by jury, punitive damages, and any existing right to an interlocutory appeal, and (2) significantly narrow their discovery requests, including no more than seven interrogatories, five notices to admit, and seven discovery depositions of no more than seven hours each.

The Advisory Council looks forward to continuing to work to ensure that businesses, as well as the lawyers who represent them, can rely on the Commercial Division of the New York State Supreme Court for the efficient and expert resolution of business disputes.

Hon. Timothy S. Driscoll is a Justice of the Supreme Court of the State of New York, Nassau County Commercial Division.